

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

WARD'S SUPERMARKET

Employer

and

Case 12-RC-9351

INDUSTRIAL WORKERS OF THE WORLD,  
GAINESVILLE GENERAL MEMBERSHIP  
BRANCH

Petitioner

**REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

The Employer, Ward's Supermarket, operates a grocery store in Gainesville, Florida. The Petitioner, Industrial Workers of the World, Gainesville General Membership Branch, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of natural foods department employees at the Employer's store.<sup>1</sup> A hearing officer of the Board held a hearing, and the Employer filed a timely brief with me.<sup>2</sup>

As evidenced at the hearing and in the Employer's brief, the parties disagree on two issues: whether the Employer's natural foods department employees share a community of interest that is sufficiently distinct from that of the Employer's other employees to warrant their inclusion in a separate appropriate bargaining unit, and whether lead cashiers must be excluded from whatever unit is found to be appropriate because they are supervisors. In addition, I find that it is necessary for me to address a third issue not explicitly raised by the parties: whether

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<sup>1</sup> At the hearing, the Petitioner stated that it wishes to proceed to an election in an alternate unit if the unit sought is found to be inappropriate by the Regional Director or the Board.

<sup>2</sup> The Petitioner did not file a brief.

the Employer's meat department employees must be included in the unit that I have found appropriate.

The Employer contends that natural foods employees do not share a sufficiently distinct community of interest to warrant their inclusion in a separate bargaining unit and that only a storewide unit, including natural foods, deli, front end, grocery, meat, and produce department employees is appropriate. The Employer further contends that lead cashiers are not supervisors and should be included in the unit. The Petitioner, contrary to the Employer, contends that the natural foods employees share a distinct community of interest and comprise a separate appropriate unit and that lead cashiers are supervisors and must be excluded from whatever unit is found to be appropriate. The unit sought by the Petitioner includes about 16 employees, while the unit sought by the Employer includes about 86 employees.<sup>3</sup> As noted above, the parties did not explicitly raise the issue of whether meat department employees must be included in the unit if it is found that natural foods employees do not comprise a separate appropriate unit: the Employer contends that a storewide unit including meat department employees is appropriate but does not specifically address whether meat department employees *must* be included in the unit under relevant Board precedent concerning meat department employees, and the Petitioner has not taken a position regarding whether meat department employees should be included if it is found that a separate unit of natural foods department employees is not appropriate.

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<sup>3</sup> The parties stipulated that the Employer's two office clerical employees should be excluded from whatever unit is found to be appropriate because they are confidential employees. They further stipulated that bagger Lou Wilson should be excluded from the unit based on her familial relationship with the two store owners who are her daughter and son-in-law, and that meatcutter-in-training Chad Purdy should not be excluded from the unit based on his familial relationship with one of the store owners who is his second cousin. Based upon the stipulations of the parties and the record as a whole, I find that the two office clerical employees and bagger Lou Wilson should be excluded from the unit and that the meatcutter-in-training should not be excluded from the unit based on his familial relationship with one of the store owners, although, as explained below, I have ordered that all meat department employees, including the meatcutter-in-training, shall be permitted to vote subject to challenge.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the natural foods employees do not share a community of interest that is sufficiently distinct from that of other employees to justify their inclusion in a separate appropriate unit and that the unit therefore must include natural foods, deli, front end, grocery, and produce department employees. I find that there is insufficient evidence for me to determine whether the Employer's 12 meat department employees must also be included in the unit, and I therefore find that meat department employees should be permitted to vote subject to challenge. I have further concluded that the Employer's two lead cashiers are supervisors and must be excluded from the unit. Accordingly, I have directed an election in a unit that consists of approximately 72 employees, and I have directed that an additional 12 meat department employees shall be permitted to vote subject to challenge.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning supporting my conclusions with respect to each of the three issues presented in this case: (1) whether the Employer's natural foods department employees share a community of interest that is sufficiently distinct from that of the Employer's other employees to warrant their inclusion in a separate appropriate bargaining unit, (2) whether the Employer's meat department employees must be included in the unit that I have found appropriate, and (3) whether lead cashiers must be excluded from the unit that I have found appropriate because they are supervisors.

## **I. OVERVIEW OF OPERATIONS**

The Employer operates a grocery store, where it engages in the retail sale of various products, including produce, meats, dairy products, bread products, dry goods, bulk items, live plants, coffee, tea, spices, chocolate, wine, beer, and health and beauty products. Many of the products sold by the Employer are categorized as "natural foods." The Employer's natural foods selection includes such items as certified organic products, products with all-natural ingredients, local products, gluten-free products, and natural health and beauty products. The Employer

offers both natural foods and traditional<sup>4</sup> versions of certain types of items in its store. For example, the Employer sells both natural foods and traditional chips, cookies, crackers, milk, and pasta.

The Employer's store is located in an approximately 14,000-square-foot building. At the front of the building, there are entrance and exit doors used by both customers and employees. Just inside the doors are cash registers, where the "front end employees" (i.e., cashiers and baggers) work. An office and a courtesy booth are located next to the exit door. Toward the back of the building, there is a large enclosed area containing a natural foods office, a meat cooler, and a produce preparation area. This area is not accessible to customers. There is an office, which also is not accessible to customers, on a second floor above the enclosed area. The building has two back doors which are used only by employees. One back door leads out of the produce preparation area and is adjacent to the meat coolers. The other back door is located immediately behind an area of the store which contains most of the natural foods items.

In the portion of the building accessible to customers, behind the cash registers, there are various natural foods and traditional items, including traditional apples, traditional potatoes, natural foods fresh bread, Odwalla products (a natural foods item), tofu (a natural foods item), wine, cheese, and some meats. There is a produce area in one of the front corners of the store, and there are traditional grocery, beer, bread, and deli sections in the other front corner. There is a meat case along a back wall separating the store from the enclosed area toward the back. Toward one side of the building, there is a relatively large natural foods area. Along a side wall of the building, next to the natural foods area, there are freezers and a dairy section containing separate but adjacent natural foods and traditional foods sections. Toward the front of the store, near the natural foods section, there are areas containing chocolate and wine (both at least in part considered natural foods items), natural foods bulk items, natural foods coffee and

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<sup>4</sup> Throughout this decision, I will use the word "traditional" to describe items that are not considered to be natural foods items.

tea, and natural foods and traditional spices. On the porch outside the front doors of the store, there are live plants, which are categorized as natural foods items.

Thus, natural foods are generally segregated into separate sections, and employees strictly adhere to the boundaries dividing the various sections in the store. In areas such as the dairy area where a natural foods section is adjacent to a traditional foods section, employees ensure that natural foods items do not overflow into traditional foods sections and vice versa. Although natural foods items are generally located in separate natural foods sections, there are some areas where natural foods products are interspersed to some extent with other items. For example, minced garlic (apparently categorized as a produce item) is located above the area where tofu (a natural foods item) is kept, and natural foods products are sometimes placed under the produce cases when the natural foods department needs extra space.

Behind the building, against the back wall, there are three natural foods storage sheds: a cooler containing wine and natural foods bulk items, a cooler containing natural foods dairy items, and a freezer containing natural foods items.<sup>5</sup> There is also a produce storage area against the back wall. A baler, used to bale leftover cardboard boxes from all departments, is also located against the back wall of the building. Farther behind the building, there is a common area where traditional items and natural foods items are kept temporarily after they are unloaded from suppliers' trucks and before they are moved into the store or the appropriate storage area. To the side of the building, across a parking area, there are separate freestanding traditional grocery and natural foods dry goods storage sheds. In another parking area, located across a road that runs behind the building, there are also three freestanding supply storage sheds. Those sheds contain general store supplies, such as trays, cups, and labels, for all departments in the store, including the natural foods department.

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<sup>5</sup> There appears to be some dispute concerning whether or not traditional items are sometimes stored in natural foods sheds. I find it unnecessary to resolve this dispute, since, even assuming that no traditional items are ever stored in any of the natural foods shed, I would still find that natural foods employees do not share a sufficiently distinct community of interest to justify their inclusion in a separate unit.

The Employer's workforce is divided into different departments, which roughly correspond to the different areas of the store. The deli department is staffed by two deli clerks and a deli manager. Lead cashiers, cashiers, baggers, and one stock clerk belong to the front end department, which is managed by one of the two store owners and a front end manager. There is one stock clerk responsible for stocking traditional grocery items in the grocery department. The grocery stock clerk reports to the grocery manager.<sup>6</sup> There is a meat department comprised of meatcutters, a meatcutter in training, meat clerks, and stock clerks. The meat department employees report to a meat manager and assistant manager. The produce area is staffed by stock clerks, prep clerks, and receiving employees belonging to the produce department. A produce manager and assistant manager supervise the produce department. The Employer employs two office clerical employees who the parties agree should be excluded from the bargaining unit because they are confidential employees. The office clerical employees report to one of the two store owners. In the natural foods department, the Employer employs 16 stock clerks: four responsible for natural foods dairy items and perishables, five responsible for natural foods groceries, three responsible for repackaging bulk items, one responsible for health and beauty items and vitamins and supplements, and three responsible for bulk products. The natural foods employees report to a natural foods manager and assistant manager. All department managers and assistant managers report to the two store owners, who are also the store managers.<sup>7</sup>

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<sup>6</sup> The grocery stock clerk is identified as being part of the Employer's "Management Team" in the Employer's employee handbook, and a natural foods employee testified that it was his understanding that the grocery stock clerk was a department manager. However, neither party contended that he was a supervisor within the meaning of Section 2(11) of the Act or introduced any other evidence tending to show that he was a statutory supervisor. Based on the record evidence concerning the job functions of the grocery stock clerk, I shall include the grocery stock clerk in the unit.

<sup>7</sup> The parties stipulated, and I find, that the deli manager, front end manager, grocery manager, meat manager, assistant meat manager, natural foods manager, assistant natural foods manager, produce manager, assistant produce manager, and store managers are supervisors within the meaning of Section 2(11) of the Act.

Having provided an overview of the Employer's operations, I will now turn to an analysis of the three issues presented in this case: (1) whether the Employer's natural foods department employees constitute a separate appropriate unit, (2) whether the Employer's meat department employees must be included in the unit, and (3) whether lead cashiers must be excluded from the unit because they are supervisors.

## **II. APPROPRIATENESS OF A BARGAINING UNIT INCLUDING ONLY NATURAL FOODS EMPLOYEES**

In assessing whether employees belonging to a particular department in a retail grocery store constitute a separate appropriate unit, the Board generally applies a community-of-interest analysis. *Ray's Sentry*, 319 NLRB 724, 725 (1995). In order to constitute a separate appropriate unit, the employees in a grocery store department must share a community of interest that is "sufficiently distinct" from that of other grocery store employees to warrant their inclusion in a separate appropriate unit. *Id.* at 725-26. In determining whether a group of employees shares a community of interest, the Board considers the following factors: (1) the nature of employee skills and functions, (2) the degree of functional integration, (3) the extent of common supervision, (4) interchangeability and contact among employees, (5) the employees' work situs, (6) working conditions and benefits, and (7) collective bargaining history. See *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004); *Ray's Sentry*, above at 725-26.

Although the Board generally applies a community-of-interest analysis in determining whether employees belonging to a particular department in a retail grocery store constitute a separate appropriate unit, the Board has historically viewed skilled meat department employees differently from other grocery store employees. Traditionally, the Board applied a presumption that separate units of meat department employees were appropriate because meatcutters were required to exercise a full range of traditional meatcutting skills which rendered them skilled craftspeople. See, e.g., *Big Y Foods*, 238 NLRB 855 (1978); *R-N Market, Inc.*, 190 NLRB 292 (1971). However, the Board's analysis of the appropriateness of separate meat department

units evolved as grocers increasingly elected to order boxed meats rather than carcasses for processing by their meatcutters. See *Super K Mart Center*, 323 NLRB 582, 586 (1997); *Scolari's Warehouse Markets, Inc.*, 319 NLRB 153, 155-57 (1995). In determining the appropriateness of a separate unit of meat department employees in the context of meat departments using boxed meats, the Board now examines the degree to which meat department employees exercise skills and functions that are distinct from those of other employees. *Scolari's*, above at 156-57. Specifically, the Board considers such factors as the amount of time meatcutters spend cutting meat, the type and size of the pieces of meat processed by the meatcutters, the variety of cuts that can be drawn from those pieces of meat, the extent to which the meatcutters must exercise skill and judgment in cutting the meat, the types of tools used by the meatcutters, the amount of training and experience required to work as a meatcutter, and the percentage of the unit engaged in skilled meatcutting. *Id.* at 157-58. The Board weighs these factors along with other community-of-interest factors in determining whether or not a separate unit of meat department employees is appropriate. See also *Wal-Mart Stores, Inc.*, 348 NLRB 274 (2006); *Super K Mart Center*, above.

It appears that the Board has never addressed the appropriateness of a separate unit of natural foods department employees. Since, with the exception of its now slightly different treatment of meat department employees, the Board applies a traditional community-of-interest analysis in assessing the appropriateness of separate departmental units in retail grocery stores, I will apply a traditional community-of-interest analysis in assessing the appropriateness of a separate unit of natural foods employees in this case. The Board's treatment of other departments in the retail grocery store setting is instructive in conducting this analysis.

In *Ray's Sentry*, the Board addressed the issue of whether bakery and deli employees including pizza employees in a retail grocery store constituted a separate appropriate unit. 319 NLRB at 724-26. The Board first noted that it has only rarely found separate units of bakery and deli employees to be appropriate. *Id.* at 725-26, citing *Valu King*, 206 NLRB 1 (1973); *Ideal*

*Super Markets*, 171 NLRB 1 (1968); *Payless*, 157 NLRB 1143 (1966); and *Overton Markets*, 142 NLRB 615 (1963). The Board then determined that the bakery and deli employees at issue were not required to have specialized skills or extensive training and that their job duties, which consisted of preparing bakery products from frozen dough and mixes and preparing and serving hot and cold foods, were similar to the job duties of bakery and deli employees whom the Board had previously included in grocery store units.<sup>8</sup> *Id.* at 726. The Board noted that the bakery and deli employees' pay rates, which were lower than those of all employees other than counter employees, indicated that the Employer did not view the bakery and deli employees as being particularly skilled. *Id.* The Board further found that all store employees including those in the bakery and deli department had similar benefits and that most employees storewide worked part-time. *Id.* The Board acknowledged that there was little interchange between bakery and deli employees and other employees, that the bakery and deli employees had their own supervisors, and that the bakery and deli department (like various other departments) had different hours from those of other departments. *Id.* However, the Board determined that these factors were not sufficient to render the bakery and deli employees "sufficiently distinct to warrant a separate unit." *Id.*

In *Ray's Sentry*, the Board explained that in the rare instances in which bakery and deli employees have been excluded from overall grocery units, "the employees were skilled, required substantial training, and/or shared other interests apart from those of grocery employees." *Id.* at 726. For example, in *Safeway Stores*, 178 NLRB 412 (1969), which involved a grocery store with a separately represented meat department, the Board permitted a craft

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<sup>8</sup> Within the bakery and deli department at issue in *Ray's Sentry*, cake mixers mixed ingredients for cakes, baked cakes, mixed frosting, frosted and decorated cakes, and assisted with customer service; clerks selected and wrapped items for customers, operated the cash register, made fried and rotisserie-baked chicken, fried potatoes and burritos, made sandwiches and salads, made popcorn, sliced meat and cheese, sliced bread, and wrapped bakery products; and fryer/bakers prepared mixes for cakes and donuts, made donuts with icing and glazing, decorated donuts, baked cakes and other baked goods, and cut and bagged baked goods. *Id.* at 724. The bakery and deli employees did not bake from scratch; they used frozen materials and dry mixes. *Id.*

severance election for bakers. The Board found the bakers to be “skilled journeymen performing the skills of their craft” with “a community of interest sufficiently separate and distinct from that of other employees to constitute them a separate appropriate unit.” *Id.* at 413. The bakers in *Safeway* made baked goods, such as decorated cakes, bread, and pastries, from primary ingredients, using the employer’s recipes and occasionally devising their own recipes. *Id.* They used tools of skilled journeymen bakers in preparing these baked goods. *Id.* The Employer had an established apprenticeship training program for bakers, in which inexperienced bakers could advance to the experienced baker classification after the completion of a two-year training period. *Id.* The bakers were supervised by bakery department managers, worked in a bakeshop in the back of the store which was inaccessible to the public, worked unusual early morning hours, and had separate lines of seniority. *Id.* Based on all of these factors, the Board found that a separate unit of bakers would be appropriate. *Id.*

The Board’s treatment of bakery and deli employees in *Ray’s Sentry* and *Safeway*, above, provides useful guidance in applying an analysis of the appropriateness of a unit of natural foods employees. I will now address the factors relevant to determining whether the natural foods employees share a sufficiently distinct community of interest to warrant their inclusion in a separate bargaining unit: (1) the nature of employee skills and functions, (2) the degree of functional integration, (3) the extent of common supervision, (4) interchangeability and contact among employees, (5) the employees’ work situs, (6) working conditions and benefits; and (7) collective bargaining history.

#### *Nature of Employee Skills and Functions*

As explained above, the Employer employs 16 stock clerks in the natural foods department: four responsible for natural foods dairy items and perishables, five responsible for natural foods groceries, three responsible for repackaging bulk items, one responsible for health and beauty items and vitamins and supplements, and three responsible for bulk products. The employees responsible for repackaging bulk items repackage bulk natural foods products, such

as herbs, teas, dried fruits, and nuts, for sale in separate packaging in the store. All of the other natural foods employees are generally responsible for stocking and tending their respective areas of the store. Perishable products, such as dairy products, must be rotated so that older products are used before newer ones. Natural foods employees also receive orders from vendors, unload products from delivery pallets, and move the products into the store or the appropriate storage area. They also assist with completing an inventory for the entire department on a monthly basis. This involves counting all products using accounting calculators. It appears that in most or all other departments, managers and assistant managers, rather than non-supervisory employees, are responsible for completing the inventory. Natural foods employees also take special orders (for instance, special orders for bulk items) from customers and retrieve ordered items for them.

In addition to receiving orders from suppliers, stocking natural foods products, assisting with inventory, and handling special orders, natural foods employees spend a significant amount of time assisting customers and answering customers' questions about natural foods products.<sup>9</sup> For example, customers ask whether certain products are gluten-free or organic or ask if products contain genetically modified organisms. Some customers ask natural foods employees to help them find very specific items, such as particular types of tea, or sodas without corn syrup. Customers also sometimes ask specialty cooking questions. One of the store managers testified that he usually refers specific questions about natural foods items to natural foods employees when he cannot answer the questions himself. Some natural foods employees are particularly knowledgeable about certain types of items. For example, one

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<sup>9</sup> A former natural foods employee testified that customer service comprised the largest component of his day-to-day job duties. He testified that he spent about one third of his working time engaging in customer service. A natural foods employee responsible for dairy items testified that he spent about half of his working time engaging in customer service. The natural foods employee responsible for health and beauty items and vitamins and supplements testified that customers are referred to her about 25 times each day with questions about products in her area.

natural foods employee is particularly knowledgeable about wine and has helped the natural foods manager with developing the store's wine section over time.

Because familiarity with the Employer's natural foods products is useful to natural foods employees when they are assisting customers, the Employer prefers to hire applicants who have worked in natural foods stores or who enjoy natural foods products themselves. However, the Employer does not require natural foods employees to have special training, skills, certifications, or experience, and it has hired a number of employees without any natural foods experience. The assistant natural foods manager testified that in hiring natural foods employees, the Employer primarily seeks employees whose backgrounds demonstrate that they can hold a job consistently for a period of time, but also finds grocery and health food experience helpful.<sup>10</sup>

The Employer does not have a formal training or apprenticeship program for newly hired natural foods employees. Rather, employees learn about natural foods products and learn to perform their job duties (such as conducting inventory and placing natural foods products in the appropriate storage areas) from other employees and from the natural foods manager and assistant manager on the job. The assistant natural foods manager testified that it typically takes one to two weeks for a new natural foods employee to be able to answer questions about products in his or her specific area and that it usually takes a fast learner one to two months to be able to answer questions about all natural foods in the department. A natural foods employee testified that it could take longer for employees who are less competent or less interested in natural foods to become knowledgeable about the Employer's natural foods

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<sup>10</sup> A review of job applications of current natural foods employees reveals that a number of natural foods employees previously worked at natural foods stores for periods ranging from several months to several years and that some natural foods employees have educational backgrounds relevant to natural foods. However, it appears that several natural foods employee had no previous experience or educational background related to natural foods before they were hired. For example, one natural foods employee was hired out of high school and had no previous job experience. Others listed prior job experience, for example at coffee shops, restaurants, drug stores, or car shops, on their applications, but did not list any prior experience or training specifically related to natural foods.

products. It appears that even experienced natural foods employees call on other natural foods employees with questions about particular products from time to time, and employees from other departments do so as well. For example, the natural foods employee responsible for health and beauty items and vitamins and supplements testified that employees from natural foods and from other departments ask her about vitamins and other products in her area on a fairly regular basis.

Although some aspects of the skills and functions of the natural foods employees, such as their knowledge of natural foods products and their participation in a monthly inventory, are unique, other aspects of their skills and functions overlap those of employees in other departments. To illustrate this point, I will briefly describe the skills and functions of employees in the deli, front end, grocery, and produce departments and will compare their skills and functions with those of the natural foods employees. The skills and functions of meat department employees will be addressed separately below in Section III, which specifically addresses whether meat department employees must be included in the unit I have found appropriate.

The two deli clerks are responsible for making slaw as well as preparing, seasoning, and cooking various types of meat on a smoker in front of the store. The items prepared by the deli clerks are displayed in the store, although it is unclear who is responsible for stocking the items and what other items, if any, are displayed in the deli area. The deli clerks are not required to have any specialized training aside from on-the-job training which they receive from the deli manager. Thus, the food preparation aspects of the deli employees' job duties to some extent resemble the job duties of the natural foods employees responsible for repackaging bulk items. Further, to the extent they are responsible for displaying deli products, the deli clerks' job duties resemble the stocking functions performed by the various types of natural foods stock clerks. Deli clerks do not need to have the same type of knowledge as natural foods employees (i.e.,

knowledge about natural foods). However, it is apparent from their job duties that they must possess some degree of knowledge concerning the preparation of various deli products.

The front end department consists of 15 cashiers, 16 baggers, 1 stock clerk, and 2 lead cashiers. The cashiers are primarily responsible for ringing up groceries. The Employer does not use scanners; it uses pricing guns and labels. Thus, when ringing up groceries, the cashiers enter the category and price of each item being purchased. Some products are categorized according to department (e.g., natural foods, deli, meat), and some are categorized according to the type of product (e.g., beer and particular produce items such as bananas). Cashiers therefore must be familiar with the codes for all of the Employer's products and with the system for categorizing products in order to ring up groceries. Cashiers are also responsible for straightening up racks around the front end in the morning. Baggers in the front end are responsible for bagging groceries, retrieving carts from the parking lot, sweeping the front porch, keeping the front end clean, and occasionally helping with cleaning spills in other parts of the store. There is no testimony regarding the job duties of the front end stock clerk, but presumably that employee stocks the shelves and racks in the area surrounding the cash registers. Cashiers and baggers are not required to have any experience, training, or certification, aside from the training they receive on the job. The skills and functions of the lead cashiers will be addressed separately below in Section IV, which addresses the supervisory status of lead cashiers. Thus, the job duties of front end employees overlap to some degree with those of natural foods employees insofar as employees in both departments are responsible for some amount of stocking and for tending their areas of the store. Further, it appears that cashiers must have particularized knowledge concerning the coding of items in the store in order to ring up products correctly.

The one employee in the grocery department, the grocery stock clerk, unloads trucks and stocks shelves with traditional grocery products, including spices, flour, sugar, canned goods, pastas, bread, domestic beer, and dairy products. Thus, the grocery stock clerk, like the

various natural foods stock clerks, unloads trucks and stocks shelves. There is no testimony in the record concerning whether or not the grocery stock clerk must be knowledgeable about the traditional grocery items in the store or about the nature and frequency of customer requests for information about traditional grocery items. It is therefore unclear whether the grocery stock clerk must have product knowledge comparable to the knowledge possessed by natural foods employees. The grocery stock clerk is not required to have any special training.

The produce department is comprised of 2 receiving employees, 4 prep clerks, and 16 stock clerks. Produce receiving clerks unload produce from trucks, check in invoices, check incoming produce for quality, move unloaded produce to the produce cooler, rotate produce so older produce is used first, and keep produce dated and fresh.<sup>11</sup> Produce prep clerks clean, slice, trim, wrap, weigh, price, and mark produce and prepare packaged pre-prepared items, such as cut melons, onions, and bell peppers. Produce prep clerks also repackage other products, such as cereals and candies, for sale in the store. Some of the products packaged by produce prep clerks are organic, though it is unclear whether organic produce is characterized as a produce product or a natural foods product. Produce stock clerks retrieve produce items from the produce cooler and put them on the proper racks in the store. Although no special training or qualifications beyond on the job training are required for produce employees, a store manager testified that receiving clerks must be sufficiently knowledgeable to assess the quality of incoming produce. Presumably, this requires familiarity with the characteristics indicative of the freshness and quality for each type of produce sold by the Employer. Further, some produce employees are as knowledgeable and conversant about organic and gluten-free products as natural foods employees. It also appears likely that produce employees are

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<sup>11</sup> There appears to be some dispute regarding whether or not produce employees also unload products for other departments including the natural foods department. I find it unnecessary to resolve this dispute because even assuming for the sake of argument that produce employees do not unload products for the natural foods department or for any other department, I find that a separate unit of natural foods employees is not appropriate.

generally more knowledgeable about produce items than natural foods employees are: a natural foods employee testified that if he were unable to answer a customer's question about a particular type of produce, he would direct the customer to ask a produce employee about the product.

Thus, although some job functions are unique to natural foods employees, many of the job duties of natural foods employees resemble those of other employees. Natural foods employees perform a customer service function which requires knowledge regarding the Employer's natural foods products, and they, apparently unlike employees in other departments, must assist with completing a monthly inventory of the products in their department. However, performing these functions does not require significant specialized skills and training. Natural foods employees are not required to have prior training or experience with natural foods in order to be hired. Further, the Employer has no formal apprenticeship program for natural foods employees. Instead, natural foods employees learn to perform their functions on the job over a matter of months. In addition, it appears that employees in some other departments (the produce department in particular) must have knowledge about the products in their departments that is roughly equivalent to the knowledge that natural foods employees have about the products in their department. Further, the invoice check-in and quality checks performed by the produce receiving employees to some extent resemble the inventory function performed by natural foods employees. Therefore, it appears that the natural foods employees' skills and functions are not particularly distinct. It further appears that the nature of their skills and functions is more closely analogous to that of the bakery and deli employees whom the Board found must be included in an overall unit of grocery store employees in *Ray's Sentry*, above, than it is to the nature of the skills and functions of the skilled journeymen bakers in *Safeway*, above. Accordingly, I find that the evidence concerning the skills and functions of natural foods employees does not support a finding that natural foods employees share a sufficiently distinct community of interest to warrant their inclusion in a separate bargaining unit.

### Degree of Functional Integration

The natural foods department is, to a great degree, functionally integrated with the other departments in the store. Organizationally, natural foods employees belong to their own department, and natural foods products are kept in separate sections in the store except in certain limited areas where they are interspersed with other products. Further, employees from each department wear different colored aprons, which are used to identify each employee's respective department. However, the natural foods department does not have a separate customer entrance; the same cashiers and baggers ring up products from all departments, including the natural foods department; and customers use the same shopping carts when shopping for products in all departments.

Financially, departments conduct their own inventory, and the Employer tracks profit and loss for each of its departments separately. The Employer tracks profit and loss in this manner to ensure that the markups in each department are sufficient to keep the Employer profitable and competitive. However, the Employer does not maintain a separate bank account for the natural foods department or prepare a separate financial statement for the department. Further, although each department has its own separate employee schedule, natural foods employees use the same timeclock and are on the same payroll as other employees, and the same office clerical employees perform administrative, bookkeeping, payroll, and human resources functions for all departments.

There is also a degree of functional integration among all of the departments in their ordering and receipt of products and supplies. Some of the Employer's suppliers supply both natural foods and traditional products and deliver natural foods and traditional products on the same truck. Although each department is generally responsible for ordering its own products, on occasion, the grocery department orders items for the natural foods department from a grocery supplier, and the natural foods department orders traditional grocery items for the grocery department from a natural foods supplier. This happens, for example, when a grocery

supplier is having a sale on a natural foods item or when a natural foods supplier is having a sale on a traditional grocery item. It appears that the employees from each department are generally responsible for unloading pallets of products for their respective departments.<sup>12</sup> Each department orders general store supplies from the same supplier, and the supplies ordered by each department are delivered together. Further, although the natural foods department has its own pricing guns, box cutters, notepads, and accounting calculators, other types of supplies and equipment, such as the forklift, pallet jacks, carts, and many general store supplies, are used by employees from all departments.

Although employees from each department are generally responsible for their own respective areas of the store, there are some areas of overlapping responsibility. For example, the store owner who manages the front end department orders, marks, and shelves chocolate, which is a natural foods item. The front end manager, the assistant natural foods manager, natural foods employees, and cashiers sometimes help her with performing these tasks. There is also some overlapping responsibility for the live plants on the front porch of the store. Baggers sometimes help move the plants, which are considered a natural foods item, when they need to be moved due to low temperatures, for example. Baggers are also responsible for keeping the front porch area clean. Further, cardboard boxes left over from all departments are baled using the baler behind the store. Although a natural foods employee testified that he baled cardboard boxes including boxes from other departments far more than other employees, he testified that employees from other departments also use the baler.

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<sup>12</sup> There appear to be disputes regarding whether suppliers deliver natural foods and traditional items on the same pallet and whether produce employees ever unload natural foods items from pallets. I find it unnecessary to resolve these conflicts since I would find that natural foods employees do not constitute a separate appropriate unit even assuming that natural foods and traditional items are never delivered on the same pallet and that produce employees never unload natural foods pallets.

Thus, although it appears that the natural foods employees have their own particular areas of responsibility, overall, the natural foods department is largely functionally integrated with the other departments in the store.

#### *Extent of Common Supervision*

As explained above in my overview of the Employer's operations (Section I), within the Employer's organizational hierarchy, the employees in the natural foods department have their own manager and assistant manager. However, all departments generally have their own manager and sometimes an assistant manager. Further, all department managers and assistant managers report to the store managers, who are also the store owners, and the authority of department managers and assistant managers is, to some extent, circumscribed by the store managers. For example, the assistant natural foods manager and the natural foods manager generally interview applicants for natural foods positions and decide whether or not to hire them, but their decisions generally must be approved by the store managers.<sup>13</sup> Further, the natural foods manager and assistant manager sometimes consult with the store managers concerning "more sticky matters of discipline" and on-going problems before deciding whether to issue discipline. The managers of each department conduct reviews of employees' performance every six months and make recommendations regarding whether each employee should receive a raise. However, their recommendations must be (and routinely are) approved by the store managers. Further, it appears that on occasion the store managers directly instruct natural foods employees to perform particular tasks. For example, one natural foods employee

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<sup>13</sup> It appears that there may be some exceptions to this policy. A store manager testified that some employees may have been hired by department managers or assistant managers without the store managers' approval. This testimony was apparently corroborated by a former natural foods employee and a natural foods employee who testified that when they were interviewed by the natural foods manager, it was their understanding that the natural foods manager had decided to hire them on the spot, subject to their passing a drug test. The natural foods manager did not mention to them that there was any requirement that his decision needed to be approved by the store managers. Further, there was testimony that in some cases, the store managers interview applicants for natural foods positions themselves and recommend to the natural foods manager and assistant manager that the applicants be hired. In the past, the natural foods manager and assistant manager have rejected applicants recommended for hire by the store managers.

testified that on one or two occasions during the course of his approximately 13 to 14 months of employment at the store, a store manager directed him to perform specific tasks such as straightening up items in the store.<sup>14</sup>

Although department managers and assistant department managers are generally responsible for managing their own departments, it appears that they also have some supervisory authority outside their own departments. The assistant natural foods manager testified that she can discipline employees outside the natural foods department if they engage in flagrant misconduct. She could only recall one instance when she has exercised this authority (by verbally reprimanding an employee for a near accident with the forklift). The assistant natural foods manager testified that when she witnesses an employee from another department engaging in misconduct that she does not consider flagrant, she notifies the manager of the employee's department rather than disciplining the employee herself. Managers and assistant managers of other departments also sometimes report misconduct of natural foods employees to the assistant natural foods manager. When this happens, the assistant natural foods manager conducts an independent investigation of the misconduct and decides whether or not the employee should be disciplined. Although department managers and assistant managers have some degree of overlapping authority with respect to disciplining employees, it appears that it is uncommon for department managers and assistant managers to direct the work of employees from other departments. One natural foods employee testified that during his approximately 13 to 14 months of employment, no manager from any department other than the natural foods department had ever directed him to perform any task.

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<sup>14</sup> A natural foods employee and a former natural foods employee testified that their interaction with the store managers was very limited. However, this testimony does not conflict with the testimony regarding the involvement of the store managers in hiring, disciplining, reviewing, and granting raises to natural foods employees since non-supervisory employees are not necessarily in a position to be familiar with an employer's decision-making procedures relating to these types of employment actions.

Thus, it appears that even though the natural foods department has its own manager and assistant manager, this arrangement is not unique to the natural foods department, and there is some degree of common supervision of all departments.

*Interchangeability and Contact*

Natural foods employees spend the bulk of their time performing work in the natural foods department. Further, employees from other departments do not fill in for absent natural foods employees, and natural foods employees do not fill in for absent employees in other departments. However, natural foods employees sometimes assist with work in other departments, particularly when other departments are busy or are short employees. For example, on at least three or four occasions, a natural foods employee voluntarily stocked the beer case (a part of the grocery department) when the grocery manager was absent on delivery day. The natural foods employee testified that he was not directed to do this. Another natural foods employee testified that she had also seen him straighten items in the beer case and assist customers in the beer aisle. The natural foods employee responsible for health and beauty products and vitamins and supplements has voluntarily helped the produce department employees cut and bag collard greens and cabbage on Sundays when she noticed that the produce department was busy. She has also helped the produce employees by putting out apples. One of the natural foods employees responsible for bulk items, which are located near the front end, sometimes helps bag and carry out groceries when the store is short on baggers, and natural foods employees sometimes help retrieve shopping carts from the parking lot on busy days. It appears that some natural foods employees have never performed work in other departments or only did so infrequently. It is less common for employees from other departments to perform work in the natural foods department. However, one cashier who was formerly a natural foods employee performed some work in the natural foods department during

the two weeks preceding the hearing in this case.<sup>15</sup> Further, cashiers sometimes perform work in the chocolate section, which is part of the natural foods department.

There is also evidence of transfers between the natural foods department and other departments. It appears that three current natural foods employees and one former natural foods employee worked in the Employer's produce department before becoming natural foods employees. Two of them had a break in employment before they were rehired to work in the natural foods department; however, it appears that two of them transferred directly from the produce department to the natural foods department. In addition, one natural foods employee quit and was later rehired as a cashier.

There is little direct evidence regarding the degree of contact between natural foods employees and employees in other departments. However, the employees from all departments work in the same building and use certain common areas of the store, such as the general store supply sheds, the shared break areas, and the area behind the store where products are unloaded. In addition, as explained above, in some areas of the store, natural foods items are adjacent to or interspersed with traditional items. Presumably, this results in some degree of contact between natural foods employees and other employees. Further, there is evidence that employees from departments other than natural foods ask one particular natural foods employee questions about the products in her area on a fairly regular basis.

Overall, even though natural foods employees spend the bulk of their time performing work in the natural foods department, there is some degree of interchange between the natural foods department and other departments, and it appears likely that there is contact among the employees from the different departments.

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<sup>15</sup> The cashier's assistance in the natural foods department began after December 9, 2008, when the Petitioner filed the petition in Case 12-RC-9348, in which the Petitioner initially sought to represent a unit of the Employer's natural foods employees. However, the assistant natural foods manager testified that the cashier was not asked to perform work in the natural foods department because of or in response to the filing of the petition.

### Work Situs

The employees in all departments, including the natural foods department, work in the same building. Although natural foods products are generally located in their own sections and storage areas, as explained above, natural foods products are sometimes adjacent to or interspersed with traditional products in the store, and there are various areas of the store that are used by employees from all departments, including the natural foods department. The shared work situs of the natural foods employees and other employees in the store weighs in favor of a finding that natural foods employees share a community of interest with the employees in other departments.

### General Working Conditions and Benefits

It appears that natural foods employees are generally subject to the same working conditions as other employees, with some limited exceptions. Specifically, one natural foods employee testified that he bales cardboard boxes more than any other employee, though employees from other departments also occasionally engage in this task. He testified that baling boxes presents some safety risk because of the weight of the heavy bales of cardboard boxes released from the baler. He testified that he wears steel-toed boots to prevent injury to his feet, though he is not required to do so. Natural foods employees must also cross a parking area to retrieve products from the natural foods dry goods shed. A natural foods employee testified that this creates some risk of injury by vehicles moving through the parking area. However, grocery employees also must cross the same parking area to retrieve products from the grocery shed, and employees must cross a street to retrieve items from the supply sheds containing supplies for all departments.

The natural foods employees' working conditions also appear to be similar to those of the employees in other departments insofar as the majority of employees in the natural foods department, like the majority of employees in the store, work part-time. The largest proportions of part-time employees work in the front end department, the natural foods department, and the

produce department. None of the deli or grocery department employees work part-time, and only 3 of the 12 meat department employees work part-time.

Further, the same employment policies apply to all employees in the store. The Employer maintains an employee handbook which applies to employees in all departments. There is also an additional “natural foods employee info packet” which applies to natural foods employees. The assistant natural foods manager created the packet to address issues that arise frequently in the department. The packet includes a dress code which is essentially the same as a dress code contained in the side pocket of the employee handbook entered into evidence at the hearing. The packet also includes detailed information regarding the break policy, the policies regarding scheduling and requesting time off, the procedures for taking and finding special orders, the policy against taking or using damaged items without the approval of a manager, and the availability of a county health insurance program. Although the policies and procedures in the information packet are not verbatim copies of the policies in the employee handbook, they do not appear to conflict with the handbook in any material sense. The Employer also uses the same employment application form for all departments in the store.

Natural foods employees and employees in other departments also have largely similar benefits. All employees in the store have 15-minute breaks in the morning and in the afternoon depending on the length of their shifts and may choose to take a lunch break; the Employer offers health insurance to all full-time employees who meet certain criteria;<sup>16</sup> and the Employer grants bonuses to all employees in the store if the store as a whole, as opposed to particular departments, reaches a certain level of profitability. The Employer also has a profit-sharing plan, which it began to phase out about five years ago by no longer allowing new employees to participate in the plan. As a result, only employees who have worked at the store for more than about five years participate in the plan. No department is excluded from participation in the

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<sup>16</sup> The criteria that full-time employees must meet in order to be eligible for health insurance are not described in the record.

plan. However, because of the turnover rate in natural foods, no natural foods employees participate in the profit-sharing plan. It appears that the only benefit unique to the natural foods department is the purchase of pizza for the natural foods employees on inventory day.<sup>17</sup>

The wages of natural foods employees are not dissimilar to those of employees in at least two other departments. The starting wage for natural foods employees ranges from \$8.00 to \$9.00 per hour. The starting rate for cashiers is the same. The starting rates for baggers (\$7.50 to \$7.75 per hour) and produce employees (\$7.50 per hour) are only slightly lower. The wage rates of deli clerks, the grocery stock clerk, meat clerks, and meat department stock clerks are not set forth in the record. A store manager testified that she was unsure of the exact wage rates of meatcutters, but she estimated that they earn about \$12.00 per hour.

Thus, the working conditions, benefits, and wage rates of natural foods employees are largely similar to those of other employees and do not tend to indicate that natural foods employees enjoy any special status or that the Employer considers the functions of the natural foods department to require uniquely extensive knowledge or skills.

#### Collective Bargaining History

There is essentially no evidence of a history of collective bargaining at the store. The Petitioner presented evidence regarding natural foods employees' submission of a petition seeking certain enhanced benefits on or about August 8, 2008. It appears that in response to the petition, a notice addressed to "Natural Foods Department Petitioners" was posted on the natural foods manager's door. The notice said that the store managers were out of town, that they had taken the petition with them, and that they would respond when they returned. I find that this evidence is insufficient to establish that the natural foods employees constituted an established bargaining unit or that the Employer had a history of collective bargaining with the natural foods employees.

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<sup>17</sup> The natural foods manager and assistant manager order the pizza, and it appears that the natural foods manager may personally pay for the pizza.

### Analysis of Community-of-Interest Factors

In summary, I find that the natural foods employees do not possess sufficiently specialized skills and functions to support a finding that they share a distinct community of interest; the natural foods department is largely functionally integrated with the other departments in the store; there is some degree of common supervision of all departments even though the natural foods department, like other departments, has its own department managers; there is interchange and contact between natural foods employees and employees in other departments; natural foods employees and other employees share a common work situs and largely similar working conditions, wages, and other benefits; and there is essentially no evidence of any history of collective bargaining. Accordingly, considering all relevant factors, I find that the natural foods employees do not share a community interest that is sufficiently distinct to warrant their inclusion in a separate bargaining unit.

### **III. APPROPRIATENESS OF THE INCLUSION OF MEAT DEPARTMENT EMPLOYEES**

As I have noted above, the parties did not explicitly raise the issue of whether meat department employees must be included in the unit if it is found that natural foods employees do not comprise a separate appropriate unit. I find that it is necessary for me to address this issue for the following reasons. When the unit sought by a petitioner is found to be inappropriate and the petitioner has indicated a willingness to proceed to an election in any unit found appropriate, the Board may consider the appropriateness of alternate units. *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999). The Board may consider both the appropriateness of alternate units suggested by the parties and the appropriateness of alternate units different from those suggested by the parties. *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). In selecting the appropriate alternate unit under such circumstances, “the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees.” *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001); *Overnite Transportation Co.*, above at 663.

In this case, I have found that the unit of natural foods employees sought by the Petitioner is inappropriate. Since the Petitioner has indicated that it wishes to proceed to an election in any unit found appropriate, I must identify the smallest appropriate unit including the petitioned-for natural foods employees. Because, as explained above, the Board has historically viewed meat department employees differently from other employees in assessing the appropriateness of their inclusion in a unit of grocery store employees, it appears to me that it may be appropriate for meat department employees to be excluded from the unit. Thus, it appears that a unit excluding the meat department employees may be the smallest appropriate unit encompassing the natural foods employees. However, as explained below, I find that there is insufficient record evidence for me to determine whether meat department employees can properly be excluded from the unit, and I have therefore directed that the Employer's 12 meat department employees shall be permitted to vote subject to challenge.

Under current Board precedent, in assessing the appropriateness of a separate unit of meat department employees in a grocery store, the Board first considers the extent to which meat department employees exercise distinct skills and functions, and it then weighs this factor along with the other traditional community-of-interest factors to determine whether the meat department employees share a distinct community of interest. *Wal-Mart Stores, Inc.*, 348 NLRB at 287-88; *Super K Mart Center*, 323 NLRB at 586; *Scolari's*, 319 NLRB at 156-57. It appears that the Board assigns special weight to the distinctness of meatcutters' skills and functions in conducting this analysis. See *id.*

The Board's decision in *Scolari's*, above, is illustrative of the Board's manner of conducting this type of analysis. In that case, a union petitioned to represent a separate unit of meat department employees, consisting of 48 experienced meatcutters, 15 fish clerks, and 1 meat wrapper. *Id.* at 153. The employer in that case received boxed meat and some pre-packaged, or case-ready, meat from its suppliers, and meatcutters were required to cut the boxed meat to make it attractive and saleable to customers. *Id.* at 153-54. Although the use of

boxed meat rather than carcasses substantially reduced the amount of boning work required of the meatcutters and the handling of pre-packaged meat required only limited skill, the meatcutters still spent a substantial portion of their time “performing the type of meatcutting work which marks meatcutters as skilled workers.” *Id.* at 153, 157. Specifically, they “regularly handle[d] large pieces of meat from which many types of cuts [could] be drawn”; “judge[d] what pieces of meat [could] be carved from a particular chuck, loin, or other piece of meat in order to maximize profit for the Employer”; “[chose] from among alternative types of cuts when carving the meat since not all possible cuts can be made from a piece”; and were required to know how to cut and seam meat, and to edge meat in order to start cuts in the best places. *Id.* at 157. The Board noted that the meatcutters, like many skilled craftspeople, provided some of their own tools (specifically, their knives), and that they used a variety of tools, including saws, knives, slicers, and mixer-grinders, in performing their work. *Id.* at 154, 157. Although it was unclear how long it would take an inexperienced apprentice meatcutter to be trained as a proficient meatcutter, the employer primarily hired only experienced meatcutters. *Id.* at 157. After finding that a substantial portion of the employees in the petitioned-for unit performed work that marked them as skilled workers, the Board addressed other community-of-interest factors, including the meat department employees’ separate supervision, limited interchange and transfers, higher pay, and common benefits, and determined that they shared “a distinct community-of-interest apart from that of the Employer’s other employees.” *Id.* at 158.

Although in *Scolari’s* the Board considered the percentage of employees engaged in skilled meatcutting work as a relevant factor in assessing the appropriateness of a separate unit of meat department employees, a separate unit of meat department employees may be appropriate even if less than half of the employees in the meat department perform skilled work. See *Super K Mart Center*, above at 588. For example, in *Super K Mart Center*, the Board found a separate unit of meat department employees appropriate even though only 4 out of the employer’s 14 meat department employees were meatcutters, with the remaining 10 being

perishable associates, including 2 who served as wrappers. *Id.* at 583, 588. The Board found that the four skilled meatcutters comprised “a substantial portion of the unit.” *Id.* at 588. The Board found that the unskilled perishable associates were properly included in the unit of meatcutters because they were “fully and functionally integrated with the meatcutters into the operation of the meat department,” they “performed supporting and ancillary functions to the meatcutters in making the product available for consumers,” a relatively large proportion of them worked full-time unlike most other employees in the store, they were “permanently assigned to the meat department and did not work in other areas of the store,” and they “constantly interact[ed] with the meatcutters and wrappers.” *Id.* Based on the degree of functional integration of the meat department employees, the Board found that a unit including all meat department employees, including the unskilled ones, was appropriate. *Id.*

In this case, there is little evidence concerning the type of meatcutting performed by the Employer’s three meatcutters and its one meatcutter-in-training. One of the store managers testified that meatcutters cut meat and put it on trays and racks. However, there is no record evidence concerning the types of meat cut by the meatcutters, or whether they begin with carcasses, boxed meat, or pre-packaged meat. There is also no evidence concerning the specific meatcutting tasks, such as boning, seaming, and edging, performed by the meatcutters, and there is no evidence concerning the degree to which they must exercise judgment in determining which cuts of meat to carve. Thus, it is difficult to assess whether the meatcutters’ functions mark them as skilled workers. However, there is some indication that meatcutters may perform skilled work. They, like the meatcutters in *Scolari’s*, own their own knives. They use saws, knives, slicers, and a grinder in performing their work. Although meatcutters are apparently not required to have any special certification, one of the store managers testified that the Employer mostly hires experienced meatcutters, though the Employer has started training new meatcutters because meatcutting is “getting to the point where it’s a dying art.” Currently, the Employer employs one meatcutter-in-training. It is unclear how long he will have to be

trained before he is considered a full-fledged meatcutter. The wage rates of meatcutters (approximately \$12.00 per hour) are substantially higher than those of other employees in the store and tend to show that the Employer considers the meatcutters to be more skilled than other employees. Further, the meatcutters and meatcutter-in-training all work full-time.

Although the Employer's five meat clerks and three meat department stock clerks appear to be unskilled and are not required to have specialized training, their work appears to be functionally integrated with that of the meatcutters and the meatcutter-in-training. Meat clerks wrap, date, and price meat and stock the meat cases. They also may use a slicer to slice lunch meats, but they do not use band saws, knives, or the grinder. Stock clerks also stock the meat cases. Meat clerks and stock clerks are responsible for monitoring the expiration dates on meat products. Only two of the five meat clerks and one of the three stock clerks work part-time. In contrast, as explained above, most of the employees in the store work part-time, and there are particularly large proportions of part-time employees in the front end, natural foods, and produce departments.

Organizationally, the meatcutters, meatcutter-in-training, meat clerks, and stock clerks belong to their own department, and they are separately supervised by a meat manager and assistant manager, although this is not unique to the meat department. Further, the meat department managers, like other department managers, report to the two store managers, and it appears that their authority to supervise the meat department is not exclusive. The meat department employees wear red aprons to signify that they work in the meat department, and they also wear white smocks or coats. It appears that the meat department employees work in an open area behind a meat counter space, and that meats are displayed in meat cases in front of the counter space. Meats that are not displayed in the cases are stored in a separate meat freezer. There is little evidence concerning interchangeability and contact between the meat department and other departments. However, the deli clerks use tools from both the meat and produce departments in preparing deli products. Also, meat department employees process

some natural foods frozen meat. It is unclear whether natural foods frozen meat processed by the meat department is sold in a natural foods area of the store or in the meat department.

Based on the types of tools used by meatcutters, their ownership of some of their tools, the Employer's apparent preference for hiring experienced meatcutters, and the higher wage rates of meatcutters, it appears that the Board might find that the meatcutters perform skilled work that marks them as craftspeople. Further, the Board might find that the meat department employees share a distinct community of interest based on the nature of the meatcutters' skills and functions and other community-of-interest factors. Given the meat clerks' and stock clerks' functional integration with the meatcutters, it appears that they would probably be properly excluded from the unit along with the meatcutters if the meatcutters were excluded. However, without more specific evidence concerning the actual tasks performed by meatcutters, the types of meat they handle, and their interchangeability and contact with employees from other departments, I cannot make a determination concerning the appropriateness of the exclusion of meat department employees. I find that the meat department employees should therefore be permitted to vote subject to challenge.

#### **IV. SUPERVISORY STATUS OF LEAD CASHIERS**

Because I have found that employees from the front end department must be included in the unit, I will address the issue of whether or not lead cashiers, who belong to the front end department, should be excluded from the unit because they are supervisors. Below, I will address the standards considered by the Board in assessing whether an individual is a supervisor, and I will then apply those standards to the facts of this case.

In Section 2(11) of the Act, a supervisor is defined as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is interpreted in the disjunctive such that an individual with the authority to engage in any one of the enumerated functions is considered to be a supervisor within the meaning of the Act. *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998). The party asserting supervisory status has the burden of proving that an individual is a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-12 (2001). An individual with the authority to engage in any of the types of employment actions enumerated in Section 2(11) is a supervisor, even if he or she has never exercised that authority. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 fn. 8 (2001).

In this case, the two lead cashiers belong to the front end department. One of the store managers also acts as the departmental manager in the front end department, and the front end manager is also responsible for supervising the employees in the department. In addition to the departmental managers and lead cashiers, there are 15 cashiers, 16 baggers, and 1 stock clerk in the department. The lead cashiers spend about 60 or 70 percent of their time running registers, just as other cashiers do. However, unlike other cashiers, they have managers' keys, which are needed to void transactions. The lead cashiers also frequently close the store, ensuring that all doors are locked.<sup>18</sup> About four nights per week, the store manager in charge of the front end and the front end manager are not present at the store. Thus, each of the lead cashiers is left as the individual with the highest level of authority in the front end department for about two nights per week.

When the front end managers are not present, lead cashiers accept applications from applicants for front end positions and submit the applications to the store manager in charge of the front end when she returns. Further, they inform the store manager if they think an applicant

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<sup>18</sup> They also "get change orders" for cashiers, "do board," and help cashiers clock in and out at 4:00 p.m. These are all apparently tasks that are not performed by cashiers, baggers, and the stock clerk. However, it is unclear precisely what is involved in performing these tasks.

looks like a good candidate for a front end position, and they conduct interviews of applicants jointly with the store manager “if [she] need[s] them.” However, it appears that lead cashiers do not have the authority to hire employees.

The lead cashiers apparently also do not have the authority to discipline or suspend employees. They may report incidents to the store manager in charge of the front end and may recommend discipline or suspension. However, the store manager conducts an independent investigation, by talking to all parties involved, before deciding whether to discipline or suspend an employee. There is no evidence concerning the frequency with which lead cashiers’ recommendations regarding discipline or suspension are followed. The store manager in charge of the front end could not give an example of a time when the lead cashiers have recommended that an employee be disciplined or suspended but testified that they had made such recommendations in the past.

There was little testimony concerning whether the lead cashiers have the authority to assign or direct employees, or to effectively recommend such action, aside from testimony that they are authorized to direct employees from other departments to assist with bagging when the store is short on baggers. Typically, they direct employees with work areas near the front end to assist with bagging. Although lead cashiers are not responsible for scheduling front end employees, in the past they have requested that employees work extra hours, including overtime hours, when the front end is short employees. However, they are only authorized to ask for volunteers to work extra hours, since as a rule the Employer does not require employees to do so. The lead cashiers can also send employees home early upon the employee’s request, or when the front end is slow. According to the store manager in charge of the front end, they decide whether to grant requests to leave early “[b]ased on the business and how many people are here and what’s happening, [and the] time of month.” Further, when work is slow, the lead

cashiers ask for volunteers to go home early and send home any volunteers. On at least one occasion, the lead cashiers sent a cashier home because she was very upset and was crying. Apparently, the lead cashiers decided that she was not fit to work due to her emotional state.

The lead cashiers have the authority to discharge employees for “major” misconduct. The store manager in charge of the front end described the authority of the lead cashiers to discharge employees as follows:

They could [discharge an employee] if it was something very drastic. As a general rule, unless it’s an employee theft, someone caught stealing, they talk to [the front end manager] and I and we do the firing. Now, if there’s something major, they would have the authority. But as a general rule, they do not do the firing.<sup>19</sup>

The store manager could not with certainty give a specific example of an instance when the lead cashiers have discharged an employee, though she could remember an incident in which a cashier who engaged in credit card fraud was discharged by someone other than herself, possibly by one of the lead cashiers, without any consultation with her.<sup>20</sup> There was no testimony concerning instances when lead cashiers have recommended that an employee be discharged for conduct that did not amount to major misconduct, or concerning the frequency with which the lead cashiers’ recommendations of discharge for less serious conduct were followed.

It appears that at least one employee perceives the lead cashiers to be supervisors. A natural foods employee testified that it was his understanding from his coworkers and the natural foods manager that the two lead cashiers and the front end manager are all front end managers. Further, on the page of the Employer’s employee handbook listing the members of

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<sup>19</sup> The store manager later reiterated that the lead cashiers were authorized to discharge employees for conduct such as theft, stating, “They do not fire anyone unless they are like caught stealing.”

<sup>20</sup> Although the store manager was not certain whether one of the lead cashiers had discharged this particular employee, testifying that she did not recall who was on duty that night, she did sum up her testimony about this authority of the lead cashiers by saying, “They certainly have done that.”

the Employer's "Management Team," the two lead cashiers are listed along with the front end manager as the management team members for customer service. Their job titles are not listed in that document. There is no evidence concerning certain secondary indicia of supervisory status, such as whether the lead cashiers' rates of pay are higher than those of other employees and whether they attend management meetings.

Based on the evidence described above, I find that the lead cashiers are supervisors and should be excluded from the unit. I base this finding on the fact that the lead cashiers have the authority to discharge employees for engaging in "major" misconduct. Although the lead cashiers may only discharge employees if their misconduct is major, it is apparent that they must exercise independent judgment in assessing whether an employee's misconduct is sufficiently serious that they can discharge the employee unilaterally or whether the employee's conduct is less serious and therefore requires consultation with the store manager.<sup>21</sup>

Though these factors are not necessarily determinative, I also find that the following factors tend to show that lead cashiers are supervisors: the lead cashiers' authority to send employees home early upon the employees' request when they consider such action feasible based on the level of activity and staffing needs in the front end; their authority to request that employees volunteer to leave early and to send volunteers home early when they determine that there is too little front end work for the employees present; their authority to request that employees voluntarily work extra hours including overtime hours when they believe there are

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<sup>21</sup> I find that this case is distinguishable from cases where the Board has determined that individuals are not supervisors despite evidence that they had very restricted and sporadic authority to discharge employees for such egregious misconduct as intoxication on the job. See e.g., *Dad's Foods, Inc.*, 212 NLRB 500 (1974). In this case, the authority of the lead cashiers is not so restricted: they may discharge employees for any conduct that they deem sufficiently significant to warrant discharge without consultation with the store manager. They are not restricted to discharging employees for certain specified kinds of misconduct, or for conduct, such as intoxication, which creates an immediate safety risk if the employee remains on the job.

not enough employees present to handle the work in the front end; and their authority to direct employees from other departments to assist with bagging. In addition, the fact that at least one employee perceives the lead cashiers to be supervisors and the fact that they are listed in the Employer's employee handbook as part of the Employer's "Management Team" are also non-determinative secondary indicia of the lead cashiers' supervisory status. The fact that the lead cashiers are regularly the highest level authority present in the front end department also is indicative of supervisory status. Accordingly, I conclude that the lead cashiers are statutory supervisors and are properly excluded from the unit I have found appropriate.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.<sup>22</sup>
3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>22</sup> The Employer is a Florida corporation with an office and place of business located in Gainesville, Florida, where it is engaged in the operation of a grocery store. During the past calendar year, the Employer has derived gross revenues in excess of \$500,000 and has purchased and received goods and services at its Gainesville location valued in excess of \$5,000 directly from points outside the State of Florida.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included:

All full-time and regular part-time employees employed by the Employer in the deli, front end, grocery, natural foods, and produce departments at its grocery store in Gainesville, Florida.<sup>23</sup>

Excluded:

Office clerical employees, guards, lead cashiers, and other supervisors as defined in the Act.<sup>24</sup>

#### **IV. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether or not they wish to be represented for purposes of collective bargaining by Industrial Workers of the World, Gainesville General Membership Branch. The arrangements for conducting the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

#### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

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<sup>23</sup> Meat department employees will be permitted to vote subject to challenge. Further, as noted above, bagger Lou Wilson is excluded from the unit based on her familial relationship with one of the store owners.

<sup>24</sup> As the unit found appropriate herein is larger than the unit initially sought by the Petitioner, and as it has been administratively determined that the Petitioner does not have an adequate showing of interest to proceed to an election among the employees in the unit, Petitioner must submit an adequate showing of interest within 14 days from the date of this Decision and Direction of Election, absent which, if Petitioner does not withdraw its petition, the petition will be dismissed.

engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized.<sup>25</sup>

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<sup>25</sup> This list may initially be used by me to determine whether or not the Petitioner has submitted an adequate showing of interest. I will, in turn, make the list available to all parties to the election only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602-5824, on or before February 10, 2009. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (813) 228-2874 or electronically. (Please see [www.nlr.gov](http://www.nlr.gov) for information about electronic filing.) Please furnish a total of **two** copies, unless the list is submitted by facsimile or electronically, in which case only one need be submitted. If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on nonposting of the election notice.

### **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5:00 p.m., EST on February 17, 2009. The request may not be filed by facsimile.<sup>26</sup>

Dated at Tampa, Florida this 3<sup>rd</sup> day of February, 2009.

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/s/Rochelle Kentov  
Rochelle Kentov, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Blvd., Suite 530  
Tampa, FL 33602

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<sup>26</sup> A request for review may also be submitted by electronic filing. See the attachment provided in the initial correspondence in this case. Guidance may also be found under *E-Gov* on the Board's website at [www.nlr.gov](http://www.nlr.gov).